

DA 94-784

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C.

In the Matter of	)	
	)	
GTE Telephone Operating Companies	)	Transmittal Nos. 873, 874, 893
	)	
Revisions to Tariff F.C.C. No. 1	)	CC Docket No. 94-81
	)	

**ORDER**

Adopted: July 14, 1994; Released: July 14, 1994

By the Acting Chief, Common Carrier Bureau:

**I. INTRODUCTION**

1. On April 22, 1994, GTE Telephone Operating Companies (GTOC), on behalf of the General Telephone Company of California (GTECA), filed Transmittal No. 873 to establish video channel service for Apollo CableVision, Inc. (Apollo), a cable company providing cable service in Cerritos, California. On that same day, GTECA also filed Transmittal No. 874 to provide this same service to an affiliated company, GTE Service Corporation (Service Corp.). Four parties, Apollo, MCI Telecommunications Corporation (MCI), National Cable Television Association, Inc. (NCTA), and the City of Cerritos, California (the City), filed petitions to reject or suspend and investigate Transmittal 873 and/or 874.

2. GTE states that it has submitted these two tariff transmittals to enable Apollo and Service Corp. to continue providing cable service to Cerritos subscribers after the previous grants of Commission authority expire, on July 17, 1994.<sup>1</sup> As discussed below, we find that Transmittal 874 violates the Communications Act and our rules, and that Transmittal 873 raises serious questions that require further investigation. We, accordingly, take action on these tariffs to enforce the law while minimizing disruption of service to cable subscribers. Specifically, for reasons set forth below, we reject Transmittal 874. We advance the effective date of Transmittal 873 for one day, suspend Transmittal 873 for one day, impose an accounting order, and initiate an investigation. We also grant temporary extensions of regulatory approvals to permit GTECA to provide channel service to Apollo during the investigation and to Service Corp. for 60 days so that it can come into compliance with the telephone-cable cross-ownership restriction without abruptly terminating cable programming service to subscribers in Cerritos.

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<sup>1</sup> Transmittal No. 873, Description and Justification (D&J) at 1; Transmittal No. 874, Description and Justification (D&J) at 1.

## II. BACKGROUND

3. In 1988, GTECA sought authority, pursuant to Section 214 of the Communications Act, as amended (Act), 47 U.S.C. § 214, to construct and maintain a 78-channel cable network in Cerritos, California. The intended customers of the service offering were Apollo Cablevision (Apollo), the cable franchisee in Cerritos, and Service Corp.<sup>2</sup> GTECA contracted with Apollo's parent company, T.L. Robak, Inc. (Robak), to construct the network. The Common Carrier Bureau (Bureau) found that the construction contract between GTECA and Robak would create a relationship between the two other than a "carrier-user relationship," and thus GTECA's proposal would violate the cable-telephone cross-ownership rules and the Cable Act of 1984.<sup>3</sup>

4. Because the City of Cerritos had concluded that no one other than GTECA had made an adequate response to the City's request for proposals to provide cable service in Cerritos, however, the Bureau found that video service "demonstrably could not exist" unless GTECA's proposal went forward.<sup>4</sup> Therefore, the Bureau found that GTECA had met the standard established in Section 63.56 of the Commission's Rules for waiver of the cross-ownership rules.<sup>5</sup> The Bureau granted GTECA a Section 214 authorization to construct and operate the Cerritos system, subject to a limited waiver of the cross-ownership rules.<sup>6</sup> Among other things, this waiver permitted Service Corp. to conduct tests using the network, but prohibited GTECA from allocating the costs associated with Service Corp.'s provision of cable service to regulated accounts.<sup>7</sup> The Bureau required GTECA to file annual reports regarding Service Corp.'s use of the network.<sup>8</sup> On review, the Commission also found that grant of a waiver of the cross-ownership rules was warranted, but imposed additional conditions, including limiting the waiver

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<sup>2</sup> General Telephone Company of California, 3 FCC Rcd 2317 (Com.Car.Bur. 1988) (Waiver Order).

<sup>3</sup> Id. at 2319 (para. 20). See Section 613(b)(1) of the Cable Act of 1984, 47 U.S.C. § 533(b)(1); Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54.

<sup>4</sup> Id. at 2322 (para. 35).

<sup>5</sup> Id. at 2323 (paras. 35-37).

<sup>6</sup> Id. at 2323 (para. 37).

<sup>7</sup> Id. at 2323 (paras. 39-41). Under its testing authority, Service Corp. has provided a near video on demand service it calls "Center Screen." See Letter from John F. Raposa, GTOC, to Acting Chief, Common Carrier Bureau (June 14, 1994).

<sup>8</sup> Id. at 2323 (para. 41).

to five years from the release date of the Order, which period is due to expire on July 17, 1994.<sup>9</sup>

5. NCTA sought judicial review of the Commission's decision to authorize the Cerritos system and to waive the cross-ownership rules. The Court found that there was good cause for grant of a waiver of the cross-ownership rules to permit Service Corp. to conduct the authorized tests, but remanded the case to the Commission because the Commission had not adequately explained why it was necessary for GTECA to hire Robak to construct the system.<sup>10</sup> The Court hypothesized that the benefits of the Cerritos system could have been achieved without the cross-ownership waiver if it were possible for GTECA to hire someone other than an affiliate of the cable programming provider for this construction project.<sup>11</sup>

6. On remand, the Commission found that it was not necessary for GTECA to hire Robak to build the cable network, and, therefore, rescinded GTECA's cross-ownership waiver and Section 214 authorization.<sup>12</sup> The Commission declined to order GTECA to divest its Cerritos facilities. Rather, the Commission "simply direct[ed] GTECA to take steps necessary to achieve compliance with the telephone company/cable television cross-ownership restriction."<sup>13</sup> The Commission also required GTECA to explain how it planned to comply with the Commission's cable-telephone cross-ownership requirements.<sup>14</sup>

7. GTECA filed a petition for stay of the Remand Order, and the Commission denied GTECA's request.<sup>15</sup> On January 5, 1994, the Court of Appeals for the Ninth Circuit stayed the effectiveness of the Remand Order pending judicial review.<sup>16</sup>

### III. TARIFF FILINGS

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<sup>9</sup> General Telephone Company of California, 4 FCC Rcd 5693, 5700-01 (paras. 50-61) (1989) (Waiver Review Order).

<sup>10</sup> National Cable Television Ass'n v. FCC, 914 F.2d 285, 288-89 (D.C. Cir. 1990) (NCTA v. FCC).

<sup>11</sup> NCTA v. FCC, 914 F.2d at 288-90.

<sup>12</sup> General Telephone Company of California, 8 FCC Rcd 8178, 8181 (para. 13) (1993) (Remand Order).

<sup>13</sup> Id. at 8182 (paras. 16-17).

<sup>14</sup> Id.

<sup>15</sup> General Telephone Company of California, 8 FCC Rcd 8753 (1993) (Stay Order).

<sup>16</sup> See Transmittal 873 D&J at 3; MCI Petition at 5; NCTA Petition at 2; City Petition at 12.

8. Through Transmittal 873, GTECA proposes to convert the contractual arrangement with Apollo, established pursuant to the cross-ownership waiver in 1989, to a tariffed common carrier service which it calls video channel service.<sup>17</sup> GTECA contemplates that Apollo would use this tariffed service to continue to provide cable service to Apollo subscribers. In Transmittal 874, GTECA proposes to provide channel service to its affiliate, Service Corp., which would permit it to continue to provide video-on-demand service to subscribers in Cerritos. Video channel service would provide transmission of cable television signals from Apollo's and Service Corp.'s locations to subscribers' homes. Under both Transmittals 873 and 874, GTECA plans to charge \$81,764 per month for this service.<sup>18</sup> In Transmittal 874, GTECA states that the rates, terms, and conditions governing the provision of video channel service to Service Corp. are identical to those set forth in Transmittal 873 under which service will be furnished to Apollo.<sup>19</sup> GTECA notes that, in 1992, Apollo prepaid its monthly payment obligations under the contract for the remainder of the 15 year contract term. Thus, GTECA concludes that if Transmittal 873 takes effect, Apollo will have already prepaid for video transmission service through May 2, 2006.<sup>20</sup>

9. MCI and Apollo argue that both Transmittals 873 and 874 should be rejected, while NCTA petitions against only Transmittal 874. The City of Cerritos requests that we suspend and investigate both transmittals. The City also requests that we extend GTECA's waiver of the cable-telephone cross-ownership rules, granted in 1989 for five years, in order to avoid disruption of cable service.<sup>21</sup>

#### IV. DISCUSSION

##### A. Need for Section 214 Authorization

10. Pleadings. Section 214 of the Communications Act, 47 U.S.C. § 214, requires all carriers to obtain authorization from the Commission prior to constructing or extending any line or engaging in transmission over any such new or extended line. MCI maintains that Transmittals 873 and 874 must be rejected because after the waiver expires on July 17, 1994, GTECA will no longer have Section 214 authorization to operate its Cerritos system.<sup>22</sup> GTECA contends that its Section 214 authority was not limited to five years, but rather that only its

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<sup>17</sup> Transmittal 873 D&J at 4.

<sup>18</sup> Id. at 8.

<sup>19</sup> Transmittal 874 D&J at 1.

<sup>20</sup> Id. at 8-9.

<sup>21</sup> City Petition at 3-4, 15-16.

<sup>22</sup> MCI Petition at 6-7.

waiver was.<sup>23</sup> GTECA also contends that the stay of the Remand Order was intended to maintain the status quo pending judicial review, so that the Section 214 authorization would remain in effect while the stay is in effect.<sup>24</sup>

11. Discussion. We reject GTECA's argument that its Section 214 authority does not expire on July 17. GTECA explicitly concedes that the waiver of the telephone-cable cross-ownership rule granted to GTECA in 1989 expires, by its terms, on July 17. Moreover, the Section 214 authority granted to GTECA was expressly conditioned on the issuance of the waiver.<sup>25</sup> Because the Commission's rules bar GTECA from operating its Cerritos system in the absence of a waiver, we conclude that GTECA's Section 214 authority will also expire on July 17.

12. We also have significant doubts about GTECA's claim that the Ninth Circuit's stay of the Remand Order in effect continues GTECA's Section 214 authority to operate the Cerritos facilities during the pendency of that review proceeding. We are, however, unable to determine the legal status of the Section 214 authority based on the current record. Therefore, we make no finding in this Order as to the effect of the Court's stay on the expiration of GTECA's Section 214 authority. On our own motion, we grant GTECA an interim Section 214 authorization to permit GTECA to provide video channel service while we consider this issue further in the context of our investigation of Transmittal 873. We also grant interim Section 214 authority for 60 days to provide service to Service Corp. under Transmittal 874 to give GTE time to bring itself into compliance with the telephone-cable cross-ownership rule. GTECA is directed by this Order, and other parties participating in this tariff proceeding are invited, to submit briefs to the Commission addressing this issue further.

#### B. Transmittal 874: Service to GTECA Affiliate

13. Pleadings. MCI and NCTA argue that Transmittal 874 must be rejected because it would violate the bar against telephone-cable cross-ownership established in the Cable Act of 1984.<sup>26</sup> MCI argues that, because Service Corp.'s video programming tests are almost complete, the justification GTECA relied on originally to obtain the waiver no longer exists.<sup>27</sup>

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<sup>23</sup> Id. at 8.

<sup>24</sup> GTECA Opposition at 9.

<sup>25</sup> Waiver Review Order, 4 FCC Rcd at 5700 (para. 50) ("The grant of a waiver for good cause permits us to grant the Section 214 coaxial cable and fiber optic cable applications for General's Cerritos project.")

<sup>26</sup> MCI Petition at 4-6; NCTA Petition at 3-4. See 47 U.S.C. § 533(b)(1); 47 C.F.R. § 63.54.

<sup>27</sup> MCI Petition at 6, citing Telecommunications Reports, 36-37 (Apr. 4, 1994).

14. In reply, GTECA does not dispute MCI's assertion that the programming and technical tests have almost been completed. Instead, GTECA argues that the Commission has no authority under the Cable Act of 1984 to reject Transmittal 874, because such action would unlawfully restrict GTECA's exercise of its First Amendment rights.<sup>28</sup> GTECA also asserts that the Commission argued in its brief in NCTA v. FCC that Service Corp. is not a "cable operator" and does not provide "cable service" within the meaning of the Cable Act of 1984.<sup>29</sup>

15. The City of Cerritos asks the Commission to extend the cross-ownership waiver and require GTECA to continue offering service to maintain the status quo. Alternatively, if the waiver is not extended, the City advocates suspension and investigation rather than rejection of Transmittal 874. The City asserts that these actions are necessary to prevent disruption of cable service to customers in Cerritos.<sup>30</sup>

16. Discussion. Transmittal 874 by its terms expressly provides transmission service to an affiliate of GTECA for the delivery of video programming. "Video programming" is defined in the Communications Act as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."<sup>31</sup> Neither GTECA nor any other party has contended that the movies shown through Service Corp.'s near-video-on-demand service should not be "generally considered comparable" to movies shown by television broadcast stations. This near-video-on-demand service is video programming within the meaning of the Communications Act. The involvement of Service Corp., an affiliate of GTECA, with the provision of video programming violates Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. § 63.54, 63.55, and Section 533(b) of the Communications Act, 47 U.S.C. § 613(b), absent a waiver. As previously indicated, after July 17, 1994, GTECA's waiver of Sections 63.54 and 63.55 of the Commission's Rules will expire by its terms. We therefore conclude that Transmittal 874 is patently unlawful on its face and must be rejected.

17. We reject GTECA's reliance on the C&P case for the proposition that the cross-ownership rule is unconstitutional. In C&P, the Federal District Court for the Eastern District of Virginia concluded that the cross-ownership rules are an unreasonable restriction on the

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<sup>28</sup> GTECA Opposition at 3-6, citing C&P v. United States, 830 F.Supp. 909 (E.D. Va. 1993), appeal pending No. 93-2340 (4th Cir.) (C&P). This appeal has been stayed while Congress considers whether to adopt legislation in this area. Chesapeake and Potomac Telephone Company v. United States, Docket No. 93-2340(L) (CA-92-1751-A), (4th Cir., June 15, 1994).

<sup>29</sup> GTECA Opposition at 7 n.11.

<sup>30</sup> City Petition at 26-28.

<sup>31</sup> Section 522(19) of the Communications Act, 47 U.S.C. § 602(19).

speech of communications common carriers, and thus violate the First Amendment.<sup>32</sup> The Commission found in the Remand Order, however, that the C&P case did not limit the Commission's ability to rescind the waiver in this case.<sup>33</sup> Moreover, the Commission has previously stated that the cross-ownership rule is consistent with the First Amendment to the Constitution.<sup>34</sup> GTECA has provided no grounds for the Commission to revisit that determination here.

18. The Commission concluded in the Remand Order in November 1993 that GTECA would have to take some action to comply with the cross-ownership rules.<sup>35</sup> GTECA has been on notice since the original grant of the cross-ownership waiver in 1989 that this waiver will expire on July 17, 1994.<sup>36</sup> Neither GTECA nor Service Corp. has made arrangements to ensure the continuation of video programming service to its Cerritos subscribers upon expiration of the waiver. Nevertheless, in order to avoid an abrupt interruption of service to customers of Service Corp., we offer GTOC an opportunity to come into compliance with the Cable Act of 1984. To accomplish this result, we grant a limited waiver of the cross-ownership waiver and Section 214 authorization for a period of 60 days after the release date of this Order. During this period, Service Corp. must either find an independent third party to provide the video programming services now provided by Service Corp. or notify its customers that it has decided to terminate providing video programming services. In order to provide an orderly transition for customers, GTECA must notify each subscriber that can receive its video programming service of the action it will take to bring itself into compliance with the Act, and to provide each subscriber a copy of this Order upon request. We require GTECA to submit a copy of its proposed notification for our review and approval prior to giving the notice to its customers.

19. The City of Cerritos has asked us to extend GTECA's waiver while any investigation of Transmittal 873 is pending, in order to prevent disruption of cable service.<sup>37</sup> Because we find that such an indefinite extension would not be consistent with the D.C. Circuit's mandate in NCTA v. FCC, we must deny this request.

#### C. Transmittal 873: Service to Apollo

20. In this section, we address issues raised by petitioners with respect to Transmittal

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<sup>32</sup> C&P, 830 F.Supp. at 926-31.

<sup>33</sup> Remand Order, 8 FCC Rcd at 8178 n.3. See also Stay Order, 8 FCC Rcd at 8754 n.12.

<sup>34</sup> Stay Order, 8 FCC Rcd at 8754 (para. 8).

<sup>35</sup> Remand Order, 8 FCC Rcd at 8182 (paras. 15-17).

<sup>36</sup> Waiver Review Order, 4 FCC Rcd at 5700 (para. 52).

<sup>37</sup> City Petition at 26-28.

873. The petitioners also raised many of these issues with respect to Transmittal 874. Because we determined above that Transmittal 874 should be rejected as patently unlawful, however, we do not need to reach any of the other issues raised with respect to that filing.<sup>38</sup>

### 1. Transfer of Assets

21. Pleadings. In establishing its new common carrier channel service, GTECA plans to move \$ 5.9 million in investment from non-regulated to regulated accounts. This investment has been used to provide service pursuant to the telephone-cable cross-ownership waiver to date.<sup>39</sup> GTECA also intends to establish new subaccounts in Parts 32 and 64 of the Commission's Rules, 47 C.F.R. Parts 32, 64, for video channel service.<sup>40</sup> MCI opposes the transfer of any Cerritos investment in coaxial cable from unregulated to regulated accounts because such a transfer would cause this investment to be recovered from ratepayers rather than shareholders. According to MCI, ratepayers are harmed because this additional investment and expense will either reduce GTECA's sharing obligations, or increase the amount by which GTECA could increase rates if it were eligible to make a lower end adjustment.<sup>41</sup> MCI also claims that GTECA has not complied with the affiliate transaction rules, Section 32.27 of the Commission's Rules, 47 C.F.R. § 32.27, by showing that the transferred investment is the lower of either net book cost or fair market value. According to MCI, GTECA incorrectly assumes that book value is essentially equal to fair market value in this case.<sup>42</sup>

22. In response, GTECA asserts that no ratepayers will be harmed if it transfers these assets to regulated accounts. GTECA states that it plans to transfer investment on an adjusted net book basis, and that this investment will be directly assignable to the interstate jurisdiction.<sup>43</sup> GTECA argues that the transfer of all cable investment to regulated accounts

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<sup>38</sup> Specifically, we do not reach the issues of whether GTECA has adequately shown that Transmittal 874 would not enable Service Corp. to cross-subsidize competitive video programming services with other noncompetitive services. See Apollo Petition at 20-24, City Petition at 18-19. We also do not decide whether the monthly charges to Service Corp. under Transmittal 874 would be unequal to Apollo's lump-sum payment for service under Transmittal 873, and thus unreasonably discriminatory. See MCI Petition at 2-3. Finally, we need not determine whether Transmittal 874 would have resulted in wasteful duplication of facilities. See Apollo Petition at 5-6, 25-26; City Petition at 16-18.

<sup>39</sup> Transmittal 873, D&J at 7-8.

<sup>40</sup> Id.

<sup>41</sup> MCI Petition at 8.

<sup>42</sup> Id. at 9.

<sup>43</sup> GTECA Opposition at 20.



is reasonable, because GTECA's customers for this service will use 100 percent of the network.<sup>44</sup> GTECA maintains that the transfer of these assets will not affect its price cap sharing obligation, because services priced on an individual case basis (ICB) are not incorporated into price cap indices.<sup>45</sup> GTECA claims that assuming that contract charges are equal to market value is reasonable, and complies with Section 32.27 of the Commission's Rules.<sup>46</sup>

23. On June 13, 1994, as part of its implementation of its proposed video channel service, GTECA requested a waiver of the Commission's Rules to transfer investment from nonregulated to regulated use because GTECA proposes to replace the contractual video transport agreements governing use of broadband facilities in Cerritos with a tariff for video channel service.<sup>47</sup> GTECA states that the investment in coaxial cable and related facilities currently used for video transport in Cerritos are the only facilities in that community suitable for provision of video channel service.<sup>48</sup> Therefore, GTECA asks permission to use this plant capacity, which is currently classified as nonregulated, for regulated operations.<sup>49</sup> Further, GTECA states that the needed capacity does not otherwise currently exist in Cerritos nor could such capacity be obtained without investment in entirely new facilities.<sup>50</sup> Apollo opposes this request.

24. Discussion. Under Section 32.23 of the Commission's Rules, LECs are required to make forecasts of investment for nonregulated activities on a three year basis, and must obtain a waiver to shift investment from non-regulated to regulated accounts in a way inconsistent with

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<sup>44</sup> Id. at 21.

<sup>45</sup> Id.

<sup>46</sup> Id. at 23-24.

<sup>47</sup> GTECA Waiver Petition at 3. Specifically, GTECA seeks waiver of Sections 32.23(b), 32.27(b), 64.901, and 64.902 of the Commission's Rules, 47 C.F.R. §§ 32.23(b), 32.27(b), 64.901, 64.902. Apollo submitted an opposition to GTECA's waiver request to the Bureau one day late, on June 30, 1994. Motions for extension of time are not routinely granted. See Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a). Because it appears that no party will be prejudiced by Apollo's delay, however, we will consider Apollo's opposition when considering the issue regarding GTECA's waiver request designated for investigation below.

<sup>48</sup> GTECA Waiver Petition at 3.

<sup>49</sup> Id. at 4.

<sup>50</sup> Id.

this forecast.<sup>51</sup> With respect to GTE's waiver request, we note that in the Joint Cost Order, the Commission was concerned that (1) costs associated with an investment be allocated between regulated and nonregulated operations on the basis of projected relative use and not on the actual relative use; and (2) costs actually being incurred for the benefit of the nonregulated operation not be borne by the regulated operation because the carrier underestimated the projected nonregulated use.<sup>52</sup> It is not clear from the face of GTECA's waiver request whether GTECA has made reasonable projections of relative regulated and nonregulated use, or whether the proposed transfer might result in regulated customers bearing unregulated costs. Because the issues raised by GTECA's proposed investment transfer are interrelated with the other issues raised by Transmittal 873, we include the issues raised by GTECA's waiver petition among the issues designated for investigation in this proceeding.

## 2. Apollo Contract

25. Pleadings. Currently, GTECA's provision of cable transmission service to Apollo is governed by contractual agreements established shortly after the Commission granted GTECA waiver of the cross-ownership rule and Section 214 authority. Apollo argues that GTECA proposes in Transmittal 873 to modify the terms of the contractual arrangement unilaterally through a tariff filing, in violation of the Sierra-Mobile doctrine. Apollo explains that the Sierra-Mobile doctrine was established by the Supreme Court in two companion cases in 1956, which held that carriers are prohibited under the Natural Gas Act and the Federal Power Act from abrogating or modifying contract provisions by filing tariffs.<sup>53</sup>

26. Apollo also maintains that the Commission requires carriers to show "substantial cause" before it will permit those carriers to revise tariffs in the middle of a long-term agreement.<sup>54</sup> According to Apollo, its contractual arrangement with GTECA was intended to be in effect until 2006, and GTECA has made no showing of substantial cause that would justify

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<sup>51</sup> See Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298, 1320 (para. 169 and n.284) (1987) (Joint Cost Order).

<sup>52</sup> Joint Cost Order, 2 FCC Rcd at 1320 (paras. 169-170).

<sup>53</sup> Apollo Petition at 8-9, citing United Gas Co. v. Mobile Gas Corp., 350 U.S. 332, 339 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956); MCI v. FCC, 712 F.2d 517, 535 n.27 (D.C. Cir. 1983); Bell of Pennsylvania v. FCC, 503 F.2d 1250, 1282 (3d Cir. 1974), cert. denied 423 U.S. 886 (1975). See also City Petition at 20.

<sup>54</sup> Apollo Petition at 9-10, citing, e.g., RCA American, 86 FCC 2d 1197 (1981); Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991) (substantial cause test applied to tariffed cable services).

abrogation of the terms of the contract.<sup>55</sup> Apollo argues that the policy reasons for the substantial cause test are more compelling with respect to contract services than they are for tariffed services.<sup>56</sup>

27. In addition, Apollo maintains that many of the tariff provisions are different from current contract provisions. Specifically, Apollo states that since it would no longer be responsible for maintaining and repairing the Cerritos cable facilities, providing cable converter boxes to subscribers, or billing and collecting charges for cable services from subscribers, it would no longer receive revenue from GTECA for performing these services.<sup>57</sup> Similarly, the City maintains that several provisions of the franchise agreements with Apollo and GTECA are not reflected in the tariffs.<sup>58</sup>

28. In reply, GTECA argues that the Sierra-Mobile doctrine does not apply here. GTECA asserts that the governing case is Armour Packing v. United States,<sup>59</sup> which states that a properly filed tariff, rather than a contract, establishes the legal rate for common carrier services provided to an end user customer.<sup>60</sup> According to GTECA, the Sierra-Mobile doctrine is applicable only to carrier-to-carrier contracts. GTECA further argues that Sierra-Mobile is not applicable because it is not acting "unilaterally," but rather is acting to comply with Commission rules.<sup>61</sup> GTECA also argues that the RCA substantial cause test is not applicable because it is acting to comply with Commission rules, not based upon its own business needs or objectives.<sup>62</sup>

29. GTECA further argues that the terms of the contract permit either GTECA or Apollo to terminate the installation agreement at any time.<sup>63</sup> GTECA contends that carriers usually provide maintenance, installation, and repair services in conjunction with common carrier

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<sup>55</sup> Apollo Petition at 10-11.

<sup>56</sup> Id. at 10.

<sup>57</sup> Id. at 11-13.

<sup>58</sup> City Petition at 21-23, Att. A (City of Cerritos Ordinance No. 659, granting cable franchise to Apollo), Att. B (City of Cerritos Ordinance No. 658, granting cable franchise to GTECA).

<sup>59</sup> Armour Packing v. United States, 209 U.S. 56 (1908).

<sup>60</sup> GTECA Opposition at 11-12.

<sup>61</sup> GTECA Opposition at 14.

<sup>62</sup> Id. at 14 n.17.

<sup>63</sup> Id. at 15.

services.<sup>64</sup> GTECA also denies that Apollo will be harmed by its assumption of maintenance functions. Although GTECA concedes that Apollo will lose revenue as a result of this, GTECA asserts that Apollo will also avoid the costs associated with maintenance and installation.<sup>65</sup> GTECA further denies that the tariff would alter the decoder box agreement with Apollo, and also notes that decoders are unregulated and thus the costs of these decoders are not recovered in the tariffed rate.<sup>66</sup>

30. Discussion. First, it is not clear from the record before us whether and to what extent the terms and conditions of Transmittal 873 are different from the terms and conditions established by the contractual arrangement between GTECA and Apollo. Second, the Commission has never applied the substantial cause test to a long-term carrier-customer contract such as that before us now. Similarly, it is not clear whether or how the Sierra-Mobile line of cases or the Armour Packing case apply to the GTECA-Apollo contracts. If we conclude either that the substantial cause test should be extended to this case, or that the Sierra-Mobile doctrine is applicable here, then the rates, terms, and conditions in Transmittal 873 cannot be lawful. Therefore, these legal issues must be resolved before we can find that Transmittal 873 is not unlawful. Accordingly, we direct GTECA, and invite other participants in this tariff proceeding, to submit briefs addressing these legal issues.

### 3. Common Carriage

31. Pleadings. Apollo also argues that GTECA's service is a private, not a common carrier, service and, therefore, tariffs offering a private service are not lawful. Apollo asserts that the nature of the service rather than the identity of the carrier determines whether the service is a common carrier or private carrier service.<sup>67</sup> Apollo contends that, under the terms of both the contract and the tariff, the offering would be limited to two customers rather than held out generally to the public.<sup>68</sup> Apollo contends that GTECA's reliance on past Commission precedent authorizing common carrier channel service to justify the tariffs filed here is misplaced because the services at issue in that precedent were provided to all cable companies indiscriminately.<sup>69</sup>

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<sup>64</sup> Id. at 15-16.

<sup>65</sup> Id. at 16.

<sup>66</sup> Id. at 17.

<sup>67</sup> Apollo Petition at 14-15, citing Southwestern Bell v. FCC, 19 F.3d 1476 (D.C. Cir. 1994) (Dark Fiber Remand Order); cited in City Petition at 20-21.

<sup>68</sup> Apollo Petition at 15-16.

<sup>69</sup> Id. at 16-18.

32. GTECA responds that the Commission has found in the past that video channel service is a common carrier service properly offered pursuant to tariff.<sup>70</sup> GTECA also argues that there is nothing that prohibits LECs from filing individually negotiated rates in tariffs.<sup>71</sup> On July 12, 1994, GTOC filed Transmittal No. 893, to remove language from Transmittal No. 873 limiting the offering to one customer, and to make the offering generally available.

33. Discussion. We have reviewed Transmittal 873 and the revision to that Transmittal filed by GTECA, as well as all associated pleadings. We conclude that, as revised, GTECA's tariff is not so patently unlawful as to warrant rejection, and that an investigation of this issue is not warranted at this time. Accordingly, we will not designate this as an issue for investigation.

## V. LEGAL ISSUES FOR RESOLUTION

34. As discussed above, there are a number of legal issues which GTECA and commenting parties should brief to aid us in reaching a legal conclusion on these issues. These issues are set forth below:

Issue 1. Does the Court of Appeals' stay of the Remand Order continue the Section 214 authorization in effect until judicial review is complete, or does the authorization terminate on July 18, 1994?

Issue 2. Is it lawful for GTECA to supersede the Apollo contracts with the tariff filing in Transmittal No. 873?

## VI. FACTUAL ISSUES DESIGNATED FOR INVESTIGATION

35. The following are the issues raised by Transmittal 873 that we designate for investigation:

Issue 1. Is GTECA's transfer of investment from unregulated to regulated accounts reasonable?

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<sup>70</sup> GTECA Opposition at 9-11, citing Ohio Bell Telephone Co., 1 FCC Rcd 942 (Com.Car.Bur. 1986); Pacific Bell Telephone Co. 60 Rad.Reg.2d 1175 (Com.Car.Bur. 1986); C&P Telephone Co., 60 Rad.Reg.2d 1003 (Com.Car.Bur. 1985); Commission Order, Dated April 6, 1966, Requiring Common Carriers To File Tariffs With Commission for Local Distribution Channels for Use in CATV Systems, 4 FCC 2d 257 (1966); General Telephone Company of California, Docket No. 17333, 13 FCC 2d 448 (1968).

<sup>71</sup> GTECA Opposition at 10. GTECA interprets the Dark Fiber Remand Order as finding that the Commission did not justify its conclusion that dark fiber is a common carrier service, rather than that ICB rates may not be filed in tariffs.

In order to fully investigate the petition for waiver of the Commission's rules to transfer investment from unregulated to regulated accounts, we direct GTECA to provide the following information in its direct case:

- The original cost and the associated accumulated depreciation of the plant being transferred, by Part 32 account.
- The depreciated baseline cost of the transferred plant, as of the date of transfer.
- The date the plant was placed in service.
- The net book value of the transferred plant, specified as depreciated cost minus deferred tax liabilities, as of the date of transfer.
- The estimated fair market value of the plant as of the date of the proposed transfer.
- The cost pools in GTE's Part 64 cost allocation manual to which the plant is to be transferred.

Parties are invited to comment on the information provided by GTECA in its direct case and in its petition for waiver. During the pendency of this investigation, we also require GTECA to keep accurate account of the costs associated with this service separate from other costs.

Issue 2. Are the rates and terms proposed in Transmittal 873 reasonable?

GTECA bases its rates in Transmittal 873 on the lease charges contained in the Apollo contract; and those charges were calculated to be equal to half of the total construction costs, to be collected over a 15 year period plus interest at a rate of 18.9 percent.<sup>72</sup> GTECA also states that, because Transmittal 873 is priced on an individual case basis, the service will not be incorporated into its price cap indexes.<sup>73</sup> Parties are directed to discuss whether such a rate computation is reasonable. For example, the Commission limited a price cap carrier's cost of money factor in a new service cost justification to 11.25 percent, and the Commission prescribed a rate of return of 11.25 percent for LECs not subject to price caps.

Parties are also directed to discuss the extent to which the terms and conditions of

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<sup>72</sup> GTECA Opposition at 22-23. The rates were based on half the construction costs because GTECA assumed both Apollo and Service Corp. would be using half the channels available in the Cerritos network. Id.

<sup>73</sup> GTECA Opposition at 21.

Transmittal 873 are inconsistent with the contractual arrangement with Apollo.

Issue 3. Under Transmittal 873, will the relationship between GTECA and Apollo be exclusively a "carrier-user" relationship, apart from the effect of Robak's role in the construction, as required by Section 63.54 of the Commission's Rules?

After Transmittal 873 takes effect, it appears that GTECA plans to continue to provide to Apollo the use of cable converter boxes, the boxes necessary to convert cable signals into a format that can be displayed on subscribers' television sets, on a non-regulated basis. Also, it appears that GTECA plans to continue to sub-lease space from Apollo at the location where Apollo receives satellite signals for distribution over the cable network. Thus, there is a substantial question whether these relationships violate the telephone-cable cross-ownership rule.

Section 63.54(c) of the Commission's rules, the telephone-cable cross-ownership rule, bars any financial or business relationship between a common carrier and a video programming provider except a carrier-user relationship. In NITCO, the Commission explained that the carrier-user relationship exception of Section 63.54 contemplates transactions that entail a general offer to provide on an indiscriminate basis substantially the same service or services to any and all similarly situated companies or members of the public.<sup>74</sup> The Commission found that seven separate relationships between a telephone company and a cable company, including the lease of space, exceeded the carrier-user relationship and, therefore, violated Section 63.54.<sup>75</sup>

GTECA shall explain in its direct case why its lease of space and provision of converter boxes on a non-common carrier basis are consistent with Section 63.54 of the Commission's Rules. In the alternative, GTECA may make alternative arrangements with Apollo to terminate these relationships with Apollo.

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<sup>74</sup> CCI Cablevision v. Northwestern Indiana Telephone Company, Inc., 3 FCC Rcd 3096, 3097 (para. 8) (1988), aff'd, 872 F.2d 465 (D.C. Cir. 1989), cert. denied, 493 U.S. 1035 (1990) (NITCO).

<sup>75</sup> Id.

## **VII. PROCEDURAL MATTERS**

### **A. Filing Schedules**

36. This investigation will be conducted as a notice and comment proceeding to which the procedures set forth in this Order shall apply. We require GTOC to file a direct case addressing each issue designated above no later than **August 15, 1994**. Moreover, the direct case must supply all information upon which GTOC relies to support its position. Pleadings responding to the direct case may be filed no later than **September 15, 1994**, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." GTOC may file a "Rebuttal" to oppositions or comments no later than **September 30, 1994**.

37. Parties briefing any or all of the legal issues for which we solicited further discussion must file those briefs on or before **August 15, 1994**. Parties may address all the legal issues in the same brief, and may address these issues in the same pleadings filed in the investigation discussed above. Comments on these briefs may be filed on or before **September 15, 1994**, and reply comments may be filed on or before **September 30, 1994**.

38. An original and seven copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commission's commercial copying firm, International Transcription Service, Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Also, one copy must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments should specify the docket number of this investigation.

39. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the order.

### **B. Ex Parte Requirements**

40. Ex parte contacts (i.e., written or oral communications which address the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until the commencement of the Sunshine Agenda period. The Sunshine Agenda period terminates when a final order is released and the final order itself is issued. Written ex parte contacts and memoranda summarizing oral ex parte contacts must be filed on the day of the presentation with the Secretary and Commission



employees receiving each presentation. For other requirements, see generally Section 1.1200 et seq. of the Commission's Rules, 47 C.F.R. §§ 1.1200 et seq.

## **VIII. ORDERING CLAUSES**

41. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal Nos. 873 and 874, filed by MCI Telecommunications Corporation; National Cable Television Association, Inc.; Apollo CableVision; and the City of Cerritos, California ARE GRANTED, to the extent indicated above, and are otherwise DENIED.

42. IT IS FURTHER ORDERED that, pursuant to Section 533(b) of the Communications Act, 47 U.S.C. § 613(b), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 874, IS REJECTED.

43. IT IS FURTHER ORDERED that the GTE Telephone Operating Companies SHALL FILE tariff revisions, within ten days of the release date of this Order, to become effective on one day's notice, to remove the unlawful portions of the tariff.

44. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, GTE Telephone Operating Companies, Transmittal No. 873, IS SUSPENDED for one day and an investigation of the referenced tariff transmittal, and any future tariff revisions modifying that transmittal, IS INSTITUTED.

45. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL FILE tariff revisions reflecting this suspension no later than ten days from the release date of this order. GTE Telephone Operating Companies are directed to file a supplement to its tariff, to be effective on one day's notice, in order to advance the effective date of Transmittal No. 873 to July 17, 1994, and then suspend the same for one day until July 18, 1994.

46. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL FILE a brief addressing each of the legal issues discussed in Section V of this Order. Other parties participating in this investigation may file a brief addressing each of the legal issues discussed in Section V of this Order.

47. IT IS FURTHER ORDERED, pursuant to Sections 4(i), 4(j), 201(b), 203(c), 204(a), 205, and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 201(b), 203(c), 204(a), 205, and 403, that the issues set forth in Section VI of this Order ARE DESIGNATED FOR INVESTIGATION.

48. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL BE a party to this proceeding.

49. IT IS FURTHER ORDERED that GTE Telephone Operating Companies SHALL INCLUDE a response to each item of information requested in this Order.

50. IT IS FURTHER ORDERED that pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), GTE Telephone Operating Companies shall keep accurate account of all earnings, costs, and returns associated with the rates that are the subject of this investigation.

51. IT IS FURTHER ORDERED that GTE SHALL COME INTO COMPLIANCE with the telephone company-cable television cross-ownership restrictions of Sections 63.54 and 63.55 of the Commission's Rules, 47 C.F.R. §§ 63.54, 63.55, and Section 533(b) of the Communications Act, 47 U.S.C. § 613(b), within 60 days from the date this decision is released.

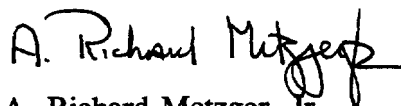
52. IT IS FURTHER ORDERED that pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, GTE Telephone Operating Companies ARE GRANTED a limited waiver of Sections 63.54 and 63.55 of the Commission's Rules, to expire 60 days after the release date of this Order, for the purpose of coming into compliance with the telephone company-cable television cross-ownership rules.

53. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, GTE Telephone Operating Companies ARE GRANTED interim authority to provide the service described in its Transmittal No. 873, during the pendency of this investigation.

54. IT IS FURTHER ORDERED that pursuant to Sections 4(i) and 214 of the Communications Act, 47 U.S.C. §§ 154(i), 214, GTE Telephone Operating Companies ARE GRANTED interim authority to provide the video channel service to GTE Service Corporation, to expire 60 days after the release date of this Order.

55. For purposes of compliance with this Order, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59. GTE Telephone Operating Companies should cite the "DA" number of this Order as the authority for these filings.

FEDERAL COMMUNICATIONS COMMISSION



A. Richard Metzger, Jr.  
Acting Chief,  
Common Carrier Bureau